No. 20-1167

IN THE SUPREME COURT OF FLORIDA

AIRBNB, INC.,
Petitioner,

v.

JOHN DOE and JANE DOE,
Respondents.

On Appeal from the
Florida District Court of Appeal, Second District, No. 19-1383

AMICI CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, THE FLORIDA JUSTICE ASSOCIATION, AND PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The American Association for Justice is a national, voluntary bar association established to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts, including by serving as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

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INTRODUCTION

Over and over again, the U.S. Supreme Court has held that a court, not an arbitrator, must decide disputes about whether parties are required to arbitrate their claims—unless there is clear and unmistakable evidence that the parties agreed otherwise. Thus, if a company wants an arbitrator to decide the scope of its arbitration provision, it must include clear and unmistakable evidence of that

intent in its arbitration clause. That's not hard. All that company needs to do is include a statement in its arbitration provision that says so: For example, the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, [or] enforceability" of the arbitration clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66, 69 n.1 (2010).[1] Easy. Companies routinely include this or similar language in their arbitration clauses, and courts routinely enforce it.

But Airbnb chose not to do that. The company concedes that its arbitration clause does not state that customers give up their right to have a court decide whether a dispute is arbitrable in the first place. Instead, Airbnb asks this Court to read in the provision that it left out. The Court may not do so.

The company insists that merely by referencing the American Arbitration Association's rules, its arbitration clause somehow clearly and unmistakably demonstrates that the parties intended to delegate arbitrability questions to an arbitrator. This argument fails at every step. First, the arbitral rules Airbnb points to contain no clear or

[1] Unless otherwise specified, all internal quotation marks, citations, alterations, and emphases are omitted.

unambiguous delegation. Second, even if they did, Airbnb's contract only references those rules to explain how an arbitration "will be administered"—not to determine whether one will occur in the first place.

Many courts have gotten this issue wrong, ignoring or misinterpreting the U.S. Supreme Court's clear-and-unmistakable-evidence requirement. But the Second District below, and the Fourth District shortly afterwards, joined a growing number of courts that have properly applied that requirement to refuse to compel arbitration of arbitrability questions when the parties have not made their intent to do so clear. This Court should affirm.

ARGUMENT

I. "Clear and unmistakable" means clear and unmistakable—explicit, not inferred.

The ordinary rule is that a court decides whether a claim must be arbitrated—not an arbitrator. *Rent-A-Center*, 561 U.S. at 69 n.1. But just as parties may agree to arbitrate the merits of a dispute, they may also agree to arbitrate questions of "arbitrability"—that is, disputes about the scope or enforceability of an arbitration clause. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

They do so by including in their contract a "delegation provision," which is "simply an additional, antecedent agreement" that an arbitrator will decide such gateway questions. *Rent-A-Center*, 561 U.S. at 68–70.

But courts may not lightly conclude that parties have made such a delegation. *See First Options*, 514 U.S. at 944–45. After all, the question who decides gateway arbitrability issues is "rather arcane." *Id.* at 945. And parties typically do not focus on that question when they consider whether to form a contract. *Id.* Courts, therefore, may only require that parties arbitrate disputes about arbitrability if there is "clear and unmistakable evidence" that they intended to do so. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

"Clear and unmistakable" is a stringent, or "heightened," standard. *Rent-A-Center*, 561 U.S. at 69 n.1. It cannot be met by "silence or ambiguity." *First Options*, 514 U.S. at 944. Indeed, across varying legal contexts, the U.S. Supreme Court has repeatedly held that a clear-and-unmistakable standard requires an explicit statement. *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waiver of rights in collective bargaining agreement is only

"clear and unmistakable" if it is "explicitly stated"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (waiver of taxation authority is only clear and unmistakable if it occurs in "terms which admit of no other reasonable interpretation"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273–77 (1908) (statutory waiver of sovereign authority is only clear and unmistakable if it contains an "express command").

The U.S. Supreme Court's meaning has itself been unmistakable: A contract cannot clearly and unmistakably mean more than it states in express terms. Delegation clauses are no different. To be clear and unmistakable, the delegation must be express. If a party's contract-interpretation argument turns on a convoluted set of inferences from silent or ambiguous text, it falls short of this standard. *See First Options*, 514 U.S. at 945 (explaining that if the parties' agreement leaves "doubts" about who should decide arbitrability, those doubts should be resolved in favor of a court, not an arbitrator).

II. There is no express delegation provision here.

1. Airbnb cannot meet the clear-and-unmistakable standard here. By its terms, Airbnb's arbitration clause requires only that the

parties arbitrate certain merits questions—not disputes about arbitrability.

Under a header labeled "Dispute Resolution," the parties' contract says:

> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration . . . .

A.137–38. Then the contract proceeds to offer a few particulars about that arbitration. One subsection, labeled "Arbitration Rules and Governing Law," specifies: "The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect . . . ." A.138.

Nowhere do either of these provisions—or any other provisions of the parties' contract—state that an arbitrator shall decide gateway arbitrability questions. Airbnb doesn't argue otherwise. Instead, it insists that, because the contract states that any arbitration "will be administered" in accordance with whatever rules the AAA happens to

have in effect at the time of the arbitration, the parties somehow agreed to arbitrate questions about whether an arbitration would occur in the first place. But that's not what the contract says.

The contract sets forth a two-step procedure. *First*, determine whether a dispute falls within the scope of its arbitration clause by examining whether that dispute arises out of Airbnb's terms or the use of its "Services" or "Site." A.137–38. Then, *second*, if the dispute falls within the scope of the clause, send it to arbitration—which "will be administered" by the AAA in accordance with the AAA rules "then in effect." A.138.

Taken together, these provisions establish that the AAA rules only apply to disputes that have *already* been determined to fall within the scope of the arbitration clause. Those rules therefore can't be used to determine which disputes fall within that scope. Airbnb's argument to the contrary puts the cart before the horse and is contrary to the terms of the contract.

Arbitration is a matter of contract, that is, "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. In this case, the parties agreed to arbitrate disputes that arise out of or

relate to Airbnb's terms or the use of Airbnb's services. They didn't agree to arbitrate questions about the scope of the arbitration clause.

2. Airbnb concedes that nothing in the text of the contract itself states that the Does agreed to arbitrate scope questions. Instead, it suggests that the contract's reference to the AAA rules can provide the missing delegation provision on the theory that the contract incorporates the AAA rules. Not so. As an initial matter, as the respondents explain (at 38), a contract only incorporates another document "for the purpose specified." *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916). And the purpose specified here is to govern *how* arbitration is "administered." Nowhere does the contract even hint that the rules should govern *whether* arbitration occurs in the first place. To nevertheless treat the AAA rules as incorporated for that purpose conflicts with the text of the contract and ordinary contract interpretation rules—and therefore falls far short of the U.S. Supreme Court's mandate that a delegation must be clear and unmistakable.

But even if the AAA rules had been incorporated into the contract for any purpose, as explained below, that still would not constitute a clear and unmistakable delegation.

III. A bare reference to arbitral rules does not constitute clear and unmistakable evidence of intent to arbitrate arbitrability.

Even if this Court deemed the AAA rules incorporated for some more general purpose, the Second District was right: The contract's mere reference to those rules cannot constitute clear and unmistakable evidence of an agreement to delegate arbitrability questions to an arbitrator. Contrary to Airbnb's contention, there is far from a unanimous consensus otherwise—and the cases that have found a delegation under similar circumstances conflict with decisions of the U.S. Supreme Court and the plain language of the AAA rules. Unable to rely on text or precedent, Airbnb resorts to arguing that it would be inconvenient for courts to enforce contracts as they were written. That's not true. And, in any event, courts may not rewrite contracts to make them more convenient.

A. Contracts that incorporate arbitral rules do not clearly and unmistakably disclose that parties are giving up their right to have a court decide threshold arbitrability questions.

1. To conclude that Airbnb's mere reference to the AAA rules is somehow enough to convey the intent to arbitrate arbitrability

requires daisy-chaining together a long list of increasingly untenable assumptions.

Consider what forming this contract would have looked like for Mrs. Doe. As is increasingly common, Mrs. Doe entered into the contract by using Airbnb's app on her iPhone. A.108.

So, *first*, on her iPhone screen, Mrs. Doe would have to find and click on the hyperlink to Airbnb's "Terms of Service." *Id.*

Second, she would need to page through those terms to find the dispute resolution section amidst pages of fine print—and to locate its reference to the AAA rules.

Third, she would need to realize that, despite the contract's language to the contrary, the AAA rules might govern not just *how* any arbitration that did occur would proceed, but the arcane question of *who* would decide whether the arbitration clause applied in the first place.

Fourth, she would need to find the relevant set of AAA rules. But that's a tall order. Airbnb insists (at 49 & n.16) it made this task easy by providing two different ways to find the rules. For one, the company says, Mrs. Doe could have clicked through a hyperlink the company provided in its contract. But that link now points nowhere,

and Airbnb never showed that it worked when she signed up. Or, the company says, Mrs. Doe could have called the number it provided for the AAA—which would've required leaving the Airbnb app's sign-up system, or finding *another* phone, dialing the provided number, and figuring out some way to receive a copy of the rules.

And all of this is in addition to the fact that, even if Mrs. Doe found her way to AAA's website or hotline, it was literally impossible for AAA to point her to the particular set of AAA rules that would govern any future arbitration. That's because Airbnb's contract says that the AAA rules that will apply to a given arbitration will be the rules "*then* in effect"—that is, in effect *at the time of that arbitration*—not at the time the parties entered the contract.[2]

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[2] The inclusion of the indeterminate "then in effect" phrase raises serious questions as to whether the AAA rules were validly incorporated into the parties' contract at all—let alone for this purpose. If the relevant rules are whatever rules AAA happens to have sometime in the future when the arbitration occurs, how could the parties' reference to those rules possibly constitute agreement to any particular provision? *See Pasquale v. Loving*, 82 So. 3d 1205, 1207 (Fla. 4th DCA 2012) (incorporation by reference into a will requires a document to be "in existence" when the will is executed); *BGT Grp., Inc. v. Tradewinds Engine Servs., LLC*, 62 So. 3d 1192, 1194–95 (Fla. 4th DCA 2011) (an incorporating document must "specifically provide that it is subject to the incorporated collateral document" and that collateral document "must be sufficiently described or referred to in

Fifth, even if Mrs. Doe navigated all these complexities, and even if she had the clairvoyance to know which rules AAA would have in effect at the time some future claim arose, she would need to read and understand a copy of those rules.

Sixth, she would need to figure out which specific rule set forth an arbitrator's authority to hear arbitrability disputes.

And *seventh*, she would need to understand that that rule constituted a delegation provision—and that a delegation provision waived her right to ask a court to decide whether she was required to arbitrate in the first place.

2. All this assumes that there even is a AAA rule that constitutes a delegation provision. But there isn't. Airbnb points to Rule 7(a) of the latest version of the AAA's Commercial Rules (or to the similarly phrased Rule 14(a) of the later-issued "Consumer Arbitration Rules"). That rule, labeled "Jurisdiction," provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or

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the incorporating [document] so that the intent of the parties may be ascertained").

counterclaim." AAA, *Commercial Arbitration Rules and Mediation Procedures* 13 (effective Oct. 1, 2013), https://perma.cc/2UKW-WQVT.

But what, exactly, does that mean? Even a savvy consumer who took all the steps described above would be hard pressed to interpret this rule as delegating arbitrability disputes to an arbitrator. The rule says the arbitrator "shall have the power" to decide such disputes. But a court, too, has that power, and the AAA rule doesn't say otherwise. *See Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 788 (2012). By its terms, then, the rule does not require that an arbitrator decide arbitrability disputes. It merely allows arbitrators to decide such disputes if the parties bring those disputes to them—for example, if a dispute was filed in arbitration in the first instance, or if the parties' contract expressly provided for the arbitration of arbitrability issues.

Any other interpretation would contravene how those words are ordinarily used. Providing that an entity has the "power" or "jurisdiction" to act conveys only that the body *is permitted* to act—not that it has the sole authority to do so. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that

the constitutional phrase "Congress shall have the power" is permissive); *Bouman v. Block*, 940 F.2d 1211, 1230 (9th Cir. 1991) (California statute providing that state courts "shall have jurisdiction" did not preclude federal courts from also exercising jurisdiction).

In sum, then, to conclude that a bare reference to the AAA rules waives the right to have a court determine arbitrability disputes, a consumer would have to take multiple unlikely (and in some cases impossible) steps to even ascertain the relevant rule—and she would then have to interpret that rule differently from its ordinary meaning. That is not what "clear and unmistakable" means.

3. Airbnb's counterarguments to this commonsense interpretation of the AAA rules are unconvincing. First, Airbnb suggests (at 39–40) that there would be no purpose to this AAA rule if it did not confer *exclusive* authority on the arbitrator to decide arbitrability issues. Not so. The rule ensures that an arbitrator has the authority to decide questions of arbitrability *if* the parties actually agreed to delegate those questions to an arbitrator. The parties simply didn't do so here. In applying to some cases but not others, the jurisdiction rule is not unique. Because the AAA rules are drafted

to apply to a variety of disputes, there are several that do not apply to every dispute. For example, rules concerning fees, the right of appeal, and location do not apply in all cases, but rather depend on the contract's terms. That doesn't make them superfluous; it just means they apply to some cases but not others.

Second, Airbnb suggests (at 41) that *Henry Schein* somehow supports the outcome it urges. Far from it. There, the U.S. Supreme Court re-emphasized the longstanding rule that arbitrability disputes are for the court unless the parties have clearly and unmistakably demonstrated their intent to the contrary. *See Henry Schein*, 139 S. Ct. at 529.

Indeed, if anything, *Henry Schein* undermines Airbnb's argument. At oral argument, multiple Justices expressed skepticism of the very argument Airbnb presses here. *See, e.g.*, Oral Arg. Tr., *Henry Schein*, 2018 WL 5447972, at *42 (Justice Gorsuch asking, "Isn't your real complaint . . . that there's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of—of a desire to go to arbitration and have the arbitrator decide arbitrability [where the only evidence of delegation was incorporation of the AAA rules]?"). And although the Court ultimately did not decide

the issue presented here, it took care to admonish courts that they "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Henry Schein*, 139 S. Ct. at 531.

B. The courts that have concluded otherwise have ignored U.S. Supreme Court caselaw and the text of the AAA rules.

Airbnb's primary argument—consuming nearly its entire brief—is to appeal to a supposed consensus that merely referencing arbitral rules in a contract is somehow sufficient to delegate arbitrability disputes to an arbitrator. That argument is doubly wrong. The courts that have reached this conclusion, none of which bind this Court, have done so with almost no analysis. And they have not gone unchallenged. To the contrary, the Second District here joined a growing chorus of courts holding that the mere reference to arbitral rules does not satisfy the requirement that delegation be clear and unmistakable.

To begin with, Airbnb's supposed consensus rests on a thin foundation. As the respondents note (at 25–26), the notion that a bare reference to arbitral rules could somehow provide clear and unmistakable evidence of an intent to delegate arbitrability issues

first emerged in the First Circuit. In *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), two corporations had entered into a distribution agreement that required the parties to settle any disputes "arising out of or in connection with the agreement . . . by binding arbitration in accordance with the rules of arbitration of the International Chamber of Commerce." *Id.* at 473. Because one of those rules specified that "any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself," the First Circuit concluded that the contract's reference to those rules was sufficient to delegate arbitrability disputes to an arbitrator. *Id.*

This opinion—decided before the U.S. Supreme Court's decision in *First Options*—is both wrong and entirely distinguishable from cases, like this one, involving the AAA rules. As an initial matter, the First Circuit did not explain how the mere statement that arbitration will take place in accordance with a particular set of rules could *ever* possibly provide clear and unmistakable evidence that the parties intended to give up their right to have a court hear arbitrability questions. The party opposing arbitration hadn't even briefed the issue. *See id.* at 473.

But even if a reference to the ICC rules, the rules at issue in *Apollo*, could constitute clear and unmistakable evidence, that's not the case with reference to the AAA rules, the rules at issue here. While the ICC rules provided that decisions as to jurisdiction "*shall be taken* by the arbitrator," *id.* (emphasis added), the AAA rules provide that the arbitrator *may* decide jurisdiction. *See supra* pages 12–14 (explaining that AAA rules state that arbitrator "shall *have the power*" to decide, not that it shall decide (emphasis added)). Courts that have relied on *Apollo* to hold that a reference to the AAA rules is sufficient to delegate arbitrability disputes have ignored this crucial distinction. *See, e.g.*, *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

These courts have also ignored the U.S. Supreme Court's repeated mandate that *courts* must decide arbitrability questions unless there is clear and unmistakable evidence that the parties intended otherwise. Indeed, most courts that have held that a bare reference to arbitral rules is sufficient for delegation have relied on nothing more than the fact that other courts have come to the same conclusion. *See, e.g.*, *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

Airbnb insists that Second District was an outlier in refusing to apply these courts' thin reasoning to this case. But that's irrelevant. The law is not "a numbers game." *Oliveira v. New Prime*, 857 F.3d 7, 19 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019). A court shouldn't render an incorrect decision simply because other courts have done so. Indeed, sometimes a "judicial chorus" does not reflect accreting wisdom, but instead "herding," or "cascading," *id.*—where courts become "increasingly more likely to simply go along with the developing group consensus" even if it's wrong, *In re Atlas IT Exp. Corp.*, 761 F.3d 177, 182–83 (1st Cir. 2014). Instead of "simply tallying the score," *Oliveira*, 857 F.3d at 19, the Second District properly considered the issue anew and rendered the decision that was legally correct—without regard to how many times other courts may have issued incorrect decisions. This Court should do the same.

To be clear, the Second District is not alone. Over time, it's become evident that *Apollo* and its progeny do not accord with the U.S. Supreme Court's case law—especially in cases like this one.

Several courts have rejected the contention that there is some "general rule" that the incorporation of the AAA rules into an arbitration clause constitutes clear and unmistakable agreement to

arbitrate arbitrability. *See, e.g.*, *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1194–96 (2009). Indeed, just months after the Second District issued the opinion below, the Fourth District adopted a similar view. *See Fallang Family Ltd. P'ship v. Privcap Cos.*, 316 So. 3d 344, 350 (Fla. 4th DCA 2021); *Laurel Point Care & Rehab. Center, LLC v. Estate of Desantis*, — So. 3d —, 46 Fla. L. Weekly D1389, 2021 WL 2448355, at *1 (Fla. 4th DCA June 16, 2021) (approvingly distinguishing *Fallang*).

And, where not already constrained by earlier misguided extensions of *Apollo*, courts have tried to narrow the breadth of the incorporation rule. For instance, several district courts have held that a bare reference to the AAA rules is insufficient to establish delegation when contracts involved at least one unsophisticated party. *See, e.g.*, *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 428–29 (E.D. Pa. 2016); *see also Calzadillas v. Wonderful Co.*, 2019 WL 2339783, at *4 (E.D. Cal. June 3, 2019) (explaining that seasonal agricultural workers were poorly positioned to understand the "frequently esoteric terms" of an arbitration agreement, especially one that referenced additional rules). These courts have emphasized

the failure of courts adopting the *Apollo* rule to pay "attention to the basic analysis" laid down by the U.S. Supreme Court for evaluating whether a delegation has occurred: Delegation requires clear and unmistakable evidence. *See, e.g.*, *Richardson v. Coverall N. Am., Inc.*, 2018 WL 4639225, at *3–4 (D.N.J. Sept. 27, 2018), *rev'd in part*, 811 F. App'x 100 (3d Cir. 2020); *Gilbert St. Developers*, 174 Cal. App. 4th at 1194. And a bare reference to the AAA rules is, at best, ambiguous. As one court explained, it is already a "difficult proposition to say that the text of an arbitration clause itself, when found among contract boilerplate," represents the parties' intent. *Allstate*, 171 F. Supp. 3d at 429. "But incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take a good joke too far." *Id.*

If a company wants to require that arbitrability disputes be heard by an arbitrator, it can easily do so, simply by saying so explicitly in its terms. But, as the Second District properly concluded, and the Fourth District now agrees, a company should not be able to

impose that result merely through an oblique reference to arbitral rules that no ordinary consumer would understand as waiving their rights.

C. Airbnb's policy arguments to the contrary are unavailing.

Shorn of its appeal to unpersuasive nonbinding precedent, Airbnb's position boils down to a policy argument: that the Second District's position would lead to a "chaotic . . . race to the courthouse" as each party sought to invoke its preferred tribunal for the consideration of arbitrability issues. Airbnb Br. 40. Such policy arguments, even if correct, do not permit this Court to disregard what the law or the parties' contract provides. *See Lawrence v. State*, 308 So. 3d 544, 551 n.5 (Fla. 2020); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their legal context, is what the text means.").

Regardless, Airbnb's policy argument is wrong. The U.S. Supreme Court has already established simple rules that specify which tribunal gets to decide arbitrability questions, and they have nothing to do with who files where first. The proper tribunal is

determined by what the contract says. If companies want to ensure that courts won't entertain arbitrability arguments, they have an easy solution: Include an express delegation provision in their contracts.

Even if this Court could consider rewriting the parties' contract based on policy concerns, the policy stakes point the other way. As an initial matter, virtually every arbitration clause references arbitral rules. *See, e.g.*, CFPB, *Arbitration Study: Report to Congress* (2015) § 2, at 42 n.109, https://perma.cc/JK76-BCKB. They have to: That's what governs how any arbitration that does arise will proceed. If a bare reference to arbitral rules constituted a delegation clause, that would transform nearly every ordinary arbitration clause into one containing a delegation clause—whether the parties want to delegate arbitrability disputes to the arbitrator or not.

What's more, as explained above, the U.S. Supreme Court has imposed the stringent clear-and-unmistakable-evidence requirement for a reason: Giving an arbitrator the power to determine their own jurisdiction removes virtually all external safeguards ensuring that the arbitrator limits their role to that specified in the parties' contract. And it enables companies to delay and make costlier any lawsuit

against them—even litigation that the contract provides may be brought in court—simply by arguing that an arbitrator must first decide whether that's so. But parties are unlikely to "focus upon" the question of who decides arbitrability or "the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945. Courts, therefore, should not lightly assume that they did so.

That concern has particular force in consumer and employment contracts, and even more force given the circumstances under which these contracts are now often formed—as take-it-or-leave-it contracts of adhesion, formed online or at the point of sale. For instance, when a consumer applies for a credit card at a department store, they may be required to review terms on a tiny pinpad device at the point of sale. Or a worker may be required to sign a contract as a condition of employment. Or, take the facts of this case, an Airbnb customer attempting to book a place to stay on a cell phone. It's difficult enough for ordinary consumers, in circumstances like these, to ferret out that there is an arbitration clause at all, let alone to find and read any arbitral rules that clause might mention, and somehow divine that those rules could affect their right to have a court decide whether

they have to arbitrate. But under Airbnb's theory, that doesn't matter. A bare reference to the AAA rules is a delegation clause, even though it can't possibly clearly and unmistakably demonstrate that an ordinary customer or employee intended to delegate arbitrability issues to an arbitrator.

Adopting Airbnb's argument would mean that companies could force their workers and customers to give up their rights without even clearly telling them they are doing so. That is not the law. The U.S. Supreme Court's case law is clear: Delegation must be clear and unmistakable. A mere reference to the AAA rules does not meet this standard.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the Florida Supreme Court by using the Florida E-Filing Portal. All participants are registered Florida E-Filing users and will be served by the E-Filing Portal:

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CERTIFICATE OF COMPLIANCE

This brief complies with Florida Rule of Appellate Procedure 9.370(b) because it contains 4,990 words excluding the parts listed in Rule 9.045(e). This brief complies with the typeface and type-style requirements of Rule 9.045(b) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

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